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No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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**JOHN A. KRAMER,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Did the trial court improperly prohibit defense counsel from explaining and emphasizing the standard of "reasonable doubt" in his summation?

2. Did the repeated warrantless searches of defendant's garbage, which had been placed on defendant's property outside his home for collection by a private garbage removal service, violate his Fourth Amendment right against unreasonable searches and seizures?

3. Did the trial court err when it submitted special interrogatories to the jury on issues relating to the conspiracy charge, rather than using a general verdict?

4. Was the defendant convicted of crimes not charged in the indictment, thereby violating his Fifth Amendment entitlement to due process of law?

5. Were the convictions the result of unconstitutional constructive amendments to the indictment?

## PARTIES TO PROCEEDING BELOW

The United States of America, plaintiff, and John A. Kramer, defendant, were the only parties to the proceedings below.

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# In the Supreme Court of the United States

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**JOHN A. KRAMER,**

*Petitioner,*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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### OPINION BELOW

The opinion of the United States Court of Appeals rendered July 5, 1983 is reported at 711 F.2d 789. The original slip opinion is contained in the appendix to this petition.

### JURISDICTION

Petitioner was convicted in the United States District Court for the Eastern District of Wisconsin. A timely appeal was taken to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. The

Court of Appeals issued its opinion on July 5, 1983. A petition for rehearing was denied on August 5, 1983 (contained in the Appendix). Review in this Court is sought pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. 4 provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const. Amend. 5 provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on . . . indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. 6 provides in part:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

On July 14, 1981 an indictment was returned charging John A. Kramer (defendant) with four violations: Count 1 charged a conspiracy to distribute, and possess with intent to distribute, marijuana and amphetamines (21 U.S.C. §846); Count 2 charged distribution and possession with intent to distribute marijuana (21 U.S.C. §841(a)(1)); Count 3 charged tax evasion for the year 1978 (26 U.S.C. §7201); and Count 4 charged tax evasion for the year 1977.

The case was tried to a jury. Counts 3 and 4 were dismissed by the court at the close of the government's case. The jury returned guilty verdicts on Counts 1 and 2.

**Statement of Facts**

*Count 2: Marijuana Distribution.* Count 2 charged that Kramer "on or about September 20, 1977 at Burlington, . . . Wisconsin, did possess, with intent to distribute and did distribute approximately 1,000 pounds of marijuana. . . ." The government's proof centered on several incidents of marijuana shipments from Wisconsin to Colorado. However, no witness testified that Kramer was involved in an approximately 1,000 pound distribution on September 20, 1977. Instead, Keith McAlister testified that it was he, not Kramer, who delivered a pickup truck loaded with marijuana to Aspen, Colorado on September 20, 1977. McAlister's Holiday Inn hotel receipt corroborated his testimony that he stayed in Aspen, Colorado on September 20, 1977.

Earlier, Herman Holbek, who stated that he was Kramer's marijuana supplier, testified that he, or his associate, Ron Wesinger, caused three or four separate deliveries of marijuana to be made to Aspen around September, 1977. But Holbek did not mention Kramer in connection with any Wisconsin-Colorado deliveries.

Susan McAlister claimed that her job in 1977 was to inventory large amounts of marijuana at her Bristol, Wisconsin residence for Holbek and Wesinger. Although she said that her husband, Keith, ferried loads of marijuana from Bristol to Aspen three times in September, 1977, she did not implicate Kramer in any of these trips.

Certain government witnesses did assert that Kramer transported and possessed large amounts of marijuana. But these alleged incidents either did not occur in September, 1977, or did not involve possession in Burlington, Wisconsin.

Wesinger asserted that Kramer picked up a bale of marijuana at Wesinger's Bristol, Wisconsin home in July, 1977; that arrangements were made later to transport marijuana to Colorado using either Keith McAlister or Kramer as couriers on unspecified dates; and that Kramer took a second load of marijuana to Colorado following McAlister's first trip. However, Kramer's possession did not occur in Burlington, as the indictment charged, but rather in Bristol, Wisconsin.

Lastly, Keith McAlister testified he had planned to take a second trip to Aspen at Wesinger's request after he had made his September 20, 1977 delivery. McAlister said Wesinger asked him to make a second Aspen trip about a week or two after his September 20, 1977 trip. Approximately three days after Wesinger made the request, Wesinger brought a truck to McAlister's house in Bristol loaded with marijuana. At that point Wesinger told McAlister that Kramer, who had been riding with Wesinger, would make the trip to Colorado.

*Count 1: Conspiracy To Distribute.* As to the marijuana conspiracy allegations,[1] the government's proof consisted of the testimony of Holbek and Wesinger who contended that they served as Kramer's suppliers of marijuana; Keith McAlister who claimed he served Holbek and Wesinger as a marijuana courier to Kramer and others; Susan McAlister who related she kept an inventory for Holbek and Wesinger, and tallied deliveries to Kramer and others; and Richard Sevick, Folts, and Halverson, who testified they purchased marijuana from Kramer in saleable quantities. Halverson also claimed she occasionally delivered marijuana to other Kramer customers.

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[1] Proof relevant to the allegations that the conspiracy also concerned amphetamines is not described here because the jury rejected that basis for a conviction.

The only non-testimonial evidence implicating Kramer in a marijuana conspiracy consisted of slips of paper confiscated on three separate dates by sheriff's deputies in October and November, 1978. These writings, which the government claimed were Kramer's marijuana price and supply records, were seized without a search warrant from the defendant's garbage at his residence in early morning sorties by deputies.

Government witnesses testified to a marijuana distribution network of varying descriptions and proportions. Holbek referred to it as the "Steinberg organization" in which one Donald Steinberg headed a group out of Florida with an associate, Jimmy Bell, and others. Holbek and Wesinger were in charge of transporting the marijuana to the Midwest and Colorado. Wesinger hired and supervised the drivers who were Keith McAlister, and others. Also, McAlister was in charge of renting and keeping "stash" or storehouses in Florida where the marijuana was stored after being unloaded from yachts owned by the Steinberg-Bell organization. Holbek-Wesinger customers included Kramer, and many others. Keith and Susan McAlister and Wesinger testified to essentially the same network. The supply line originally ran from the Florida coast to the McAlister's Bristol, Wisconsin house. In early 1978 the McAlisters moved to a house in Burlington, Wisconsin, which served as a stashhouse from which Holbek and Wesinger provided marijuana to customers such as Kramer.

Other delivery networks were described by prosecution witnesses. For example, Holbek stated that Kramer went to Boston in October of 1977 at the request of John Larson and brought marijuana to Wesinger's house. Another distribution scheme was described by Susan and Keith

McAlister in which a series of marijuana deliveries to Colorado were made by them at the behest of Ron Wesinger.

*Jury Instructions, Verdict and Deliberations.* The court submitted a verdict to the jury containing special interrogatories on Count 1. Although the verdict contained a general question as to whether or not the defendant was guilty, the special interrogatories stated:

> *Question 1*: Did the defendant, during the period charged in Count 1, conspire to possess with intent to distribute or conspire to distribute marijuana?
>
> Yes ——— No ———
>
> *Question 2*: Did the defendant, during the period charged in Count 1, conspire to possess with intent to distribute or conspire to distribute amphetamine?
>
> Yes ——— No ———

Although the jury found that Kramer did not conspire to deal in amphetamine, it found him guilty of Count 1 for conspiracy to distribute marijuana and Count 2 for possession and/or distribution of marijuana as charged.

## REASONS FOR GRANTING THE WRIT

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### I.

### DID THE TRIAL COURT IMPROPERLY PROHIBIT DEFENSE COUNSEL FROM EXPLAINING AND EMPHASIZING THE STANDARD OF "REASONABLE DOUBT" IN HIS SUMMATION?

Defendant called no witnesses to controvert the testimony of the alleged co-conspirators. He sought through cross-examination to cast doubt upon their credibility and thereby to create a reasonable doubt. He submitted proposed instructions which defined reasonable doubt. The court, in accordance with the law of the Seventh Circuit (*United States* v. *Regilio*, 669 F.2d 1169 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 2959), declined to define reasonable doubt and merely instructed the jury that reasonable doubt was that beyond which the government must prove its case in order to prevail.

Knowing that the trial court would decline to define reasonable doubt, defense counsel nevertheless attempted to give his explanation of the concept as it applied to the credibility issues in Kramer's case. On objection from the government, the court ordered defense counsel to refrain from any attempt to describe or explain the government's burden. Kramer urges this Court to find that such a restriction on defense counsel's closing argument violated his Sixth Amendment right to effective assistance of counsel.

The Court of Appeals concluded that defense counsel was not improperly restricted since in essence he sought to explain the law to the jury, when such function is the

province of the trial court. The Court also noted its prior decisions which recommend that the district courts refrain from giving an instruction which defines "reasonable doubt" because it may favor one side over the other.

Defense counsel did not seek to "instruct" the jury on reasonable doubt. He did not claim that his explanation was a definition used by the trial court. He sought to explain the concept and to exhort the jury to consider his explanation in weighing the evidence.

Defendant had a right under the Sixth Amendment's effective assistance of counsel guarantee to have his lawyer argue the case to the jury. *Herring* v. *New York*, 422 U.S. 853, 862-63 (1975). Presumably, the right to summation may be restricted. However, when the restriction prohibits counsel from giving his own definition to "reasonable doubt," it constitutes an unconstitutional restraint and deprives the defendant of a fair trial. In the instant case the trial court's restriction deprived Kramer of a significant argument which would have been made to the jury.

## II.

## DID THE REPEATED WARRANTLESS SEARCHES OF DEFENDANT'S GARBAGE, WHICH HAD BEEN PLACED ON DEFENDANT'S PROPERTY OUTSIDE HIS HOME FOR COLLECTION BY A PRIVATE GARBAGE REMOVAL SERVICE, VIOLATE HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES?

In deciding whether a Fourth Amendment violation had occurred, the Court of Appeals assumed that sheriff's deputies had trespassed onto Kramer's front yard inside a chain fence that ran along the street curb about 30 feet from Kramer's house to remove trash bags (containing

records of marijuana dealings). However, the Court concluded that the trespass itself did not violate any reasonable expectation by Kramer of privacy for this part of his property; the Court reasoned that Kramer's peaceable enjoyment of this area was not disrupted, and his interest in preserving his privacy was not offended. Hence, the Court found no Fourth Amendment violation.

Defendant believes that the Court of Appeals completely ignored direct and substantial evidence of Kramer's intent to preserve his privacy in this area, especially as to these items. Kramer advised the district court that he maintained his garbage containers with plastic tops enclosing them and placed them in a special fenced-in area, which in turn was surrounded by an exclusionary fence that ran around his property. Further, he asserted that the seized papers had been concealed in enclosed containers in this area at the time of the seizures.

For this reason the Court of Appeals' decision raises an important issue of Fourth Amendment law: whether the deliberate containment and concealment of incriminating documents in garbage containers in a deliberately exclusive area of one's private property is evidence of the owner's reasonable expectation of privacy. Other decisions by this Court involving questions of abandonment (*e.g.*, *Abel* v. *United States*, 362 U.S. 217 (1960)), or of curtilage and open fields (*e.g.*, *Hester* v. *United States*, 265 U.S. 57 (1924)) have not expressly considered this issue. Kramer urges this Court to adopt the Seventh Circuit's position that discarded garbage may be protected against warrantless seizures; on the other hand, Kramer submits that the Court of Appeals erred in its analysis by concluding that the location of the garbage in its concealed condition did not present evidence of Kramer's expectation of pri-

vacy for his records. *Cf., New York* v. *Belton,* 453 U.S. 454, 461 (1981), which suggests that a concealed container may evidence a privacy interest for the contents; and *United States* v. *Ross,* 456 U.S. 798, 823 (1982), which suggests that such a concealed container is a factor evidencing an expectation of privacy.

## III.

## DID THE TRIAL COURT ERR WHEN IT SUBMITTED SPECIAL INTERROGATORIES TO THE JURY ON THE ISSUES RELATING TO THE CONSPIRACY CHARGE, RATHER THAN USING A GENERAL VERDICT?

Kramer at first requested that the trial court submit a special verdict form to the jury on both Counts 1 and 2 which would enable the litigants to determine, in the event of a conviction or acquittal, exactly what conspiracy was involved on Count 1 and what transaction was involved in Count 2. The verdict would have included the following findings on Count 1: (1) whether the intent was to distribute or to possess with intent to distribute; (2) whether the intent was to deal with marijuana or amphetamines; and (3) who were members of the conspiracy with Kramer.

The court ruled, over defense objection, that it would give only a limited special verdict which would ask for a finding as to whether the conspiracy related to marijuana or amphetamines, or both. Defendant objected because, among other things, the court's version would not resolve the vagueness of the indictment and instead would be unduly coercive on the jury's deliberative function.[2]

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[2] The Court of Appeals did not discuss its reasons for finding no error on this issue.

It is a universal proposition that special verdicts or inquiries of the jury in criminal cases are to be avoided. For example, the Seventh Circuit itself has stated: "Special interrogatories to the jury and verdicts are generally looked upon with disfavor in criminal cases." *United States* v. *Jackson*, 542 F.2d 403, 412 (7th Cir. 1976). Although special interrogatories have been permitted in certain circumstances, primarily to protect the rights of the defendant, none of those circumstances was present in Kramer's case.

Other Circuits have been equally strong in their condemnation of the special verdict mechanism. "Special verdicts as to a single count are improper and in and of themselves erroneous." *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971). "We do not minimize the seriousness of the error when a trial court submits special interrogatories to the jury in a criminal case." *United States* v. *James*, 432 F.2d 303, 307 (5th Cir.), *cert. denied*, 403 U.S. 906 (1970).

Kramer does not rely solely upon the general proscriptions in these cases against the use of special verdicts or interrogatories. There is ample evidence in this record that the special interrogatories did *in fact* impair his right to a trial by jury.

On the one hand, the form of verdict interfered with the jury's prerogative to decide the case using common sense without the restraints of the court's interrogatories. In *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968), this Court highlighted the importance of this ingredient in the right to trial by jury: "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge,

he was to have it." Elsewhere this Court specifically noted the danger created by using a special verdict form:

> Rules of Criminal Procedure make no provisions for anything but a general verdict. Indeed, departure from this has sometimes been resisted as an impairment of the right to trial by jury . . . which usually implies one simple general verdict that convicts or frees the accused.

*Stein* v. *New York*, 346 U.S. 156, 178 (1953).

On the other hand, the two-step analysis which was imposed upon the jury here neutralized any possibility for "jury nullification." Although the courts have never encouraged it, they have regularly recognized the power of a jury "to bring in a verdict in the teeth of both law and facts," a "technical right, if it can be called so, to decide against the law and the facts. . . ." *Horning* v. *District of Columbia*, 254 U.S. 135, 138-39 (1920) (J. Holmes). A defendant who chooses to undergo trial by jury may do so with the hope that, despite overwhelming evidence against him, the jury will "nullify" the law and the facts with a finding of not guilty. The right to trial by jury affords the defendant that possibility. This is not an antiquated concept. The Fourth Circuit has stated in *United States* v. *Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970):

> We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere *to the general verdict in criminal cases*, for the courts cannot search the minds of the jurors to find the basis upon which they judge. [Emphasis supplied.]

The Fifth Circuit stated in *United States* v. *McCracken*, 488 F.2d 406, 419 (5th Cir. 1974):

> A *general verdict* insures the input of compassion into a jury's decisional process. The rule against special verdicts and special questions in criminal cases is thus nothing more or less than a recognition of the principle that "the jury, as conscience of the community, must be permitted to look at more than logic." [Emphasis supplied.]

The use of special interrogatories in criminal cases is uniformly discouraged. For this reason review should be granted to set a federal judicial policy for the form of verdicts in criminal cases.

## IV.

## WAS THE DEFENDANT CONVICTED OF CRIMES NOT CHARGED IN THE INDICTMENT, THEREBY VIOLATING HIS FIFTH AMENDMENT PROTECTION TO DUE PROCESS OF LAW?

The jury verdict regarding Count 1 indicated that Kramer was part of a marijuana distribution conspiracy. Because the court instructed the jury that it must be unanimous as to the identity of at least one co-conspirator, it must be assumed that the jury unanimously agreed that Kramer conspired with at least one particular person. Kramer was entitled to a meaningful appellate review of the adequacy of that finding; and because the makeup or membership of the conspiracy was neither specified in the indictment nor specified in the verdict, the sufficiency of the evidence supporting the jury's finding could not be determined. In reviewing the evidence, the Court of Appeals could not determine which character or characters in the government's cast of conspirators the petit jury agreed upon. Neither the indictment nor verdict suggested the answer. Nevertheless, the Court of Appeals

sustained the petit jury's conspiracy finding without knowing whether that finding bore any resemblance to the conspiracy charged.[3]

Kramer is just like the defendant in *Stirone* v. *United States*, 361 U.S. 212 (1960), except he cannot point, as Stirone could, to the indictment to demonstrate that his conviction rests on facts not found by the grand jury. In *Stirone*, the indictment charged interference with interstate commerce, namely *importation of sand* into Pennsylvania to be used in building a steel plant. The trial evidence instead showed interference with *exportation of steel* from Pennsylvania to be manufactured in the new plant. This Court would not allow the conviction to stand because the criminal conduct proven was not the conduct charged.

Here, the unfairness to Kramer is compounded by the failure of the indictment to specify the conspiracy charged and the failure of the verdict to specify the conspiracy found. The admonition in *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948), is apposite:

> It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

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[3] The Court of Appeals instead concluded that any variance on either count was harmless because the indictment allowed Kramer to prepare a defense and assert double jeopardy to a subsequent prosecution for the same offense. The Court of Appeals could not say, however, that the petit jury's finding of guilt related to crimes charged by the grand jury.

## V.

## WERE THE CONVICTIONS THE RESULT OF UNCONSTITUTIONAL CONSTRUCTIVE AMENDMENTS TO THE INDICTMENT?

### A. Count 1: The Conspiracy

Count 1 alleged a single conspiracy that had two objects: distribution of marijuana and distribution of amphetamine. In this form the indictment reflected a grand jury finding that the scope of the agreement charged encompassed both objects of the conspiracy. To sustain its charge the government was obliged to prove that at minimum two members of the conspiracy were in agreement as to the dual objects. Thus, the Second Circuit approved in single conspiracy-multiple object cases the trial court's instruction that a defendant may

> be a member of the conspiracy if the scope of his agreement included one of the objects of conspiracy, provided that the jury first found that the single conspiracy charged did exist and *that the scope of agreement made by at least two of the conspirators included both objects of the conspiracy.*

*United States* v. *Bernstein*, 533 F.2d 775, 793 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976) (Emphasis added.)

The charge to the jury here and the special interrogatories on Count 1 did not compel a finding of such an agreement with at least two conspirators sharing the dual objects of the conspiracy. Instead the district court required only that the jurors reach unanimous agreement as to the identity of one of Kramer's co-conspirators before Kramer could be found guilty. This instruction, however, neglected the threshold requirement in multiple-object conspiracies, as was alleged here as well as *Bernstein*, that the jury find that the agreement made by at

least two of the conspirators included the multiple objects of the conspiracy.

The special interrogatories neglected this threshold requirement also. Instead the district court's verdict form required only that the jury specially find whether Kramer was a member of a conspiracy to distribute marijuana, on the one hand, or a conspiracy to distribute amphetamine, or both. But this verdict form, like the judge's charge, neglected to require a finding that in fact there was a conspiratorial agreement by at least two members who shared the dual objects charged.[4]

When viewed from this perspective defendant's conviction on Count 1 could only have occurred through an unconstitutional constructive amendment of the indictment. Only if the government first established the existence of the dual-object agreement between two conspirators would the crime charged by the grand jury have been proven. But the crime defined by the court to the petit jury here was not the crime charged and Kramer now stands unconstitutionally convicted for a criminal conspiracy that differs from that defined by the grand jury. *Stirone* v. *United States*, 361 U.S. 212 (1960).

The evidence at trial did not show any two alleged conspirators who combined and agreed as to distribution of both marijuana and amphetamine. In fact, Holbek and Kramer were the only persons in the whole case who were shown to have shared any connection with both marijuana and amphetamine. The jury's finding that Kramer himself did not conspire regarding amphetamine then neces-

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[4] In fact, the jury's special finding that Kramer was not a member of an amphetamine-related conspiracy suggests that the jury found no dual-object agreement in this case at all. It obviously meant that Kramer himself had no agreement with any conspirator involving both substances.

sarily meant that a dual-object agreement was not proven so that the conspiracy charged was not proven.

**B. Count 2: The Substantive Charge**

Count 2 charged that Kramer possessed and distributed about 1,000 lbs. of marijuana on or about September 20, 1977 at Burlington, Wisconsin. The government proved that Keith McAlister possessed and distributed that amount on September 20, not Kramer. Over defense objection, the government also elicited testimony that Kramer did possess and distribute large quantities of marijuana, but these incidents either substantially preceded or followed September 20. Moreover, these incidents involved Kramer's possession in Bristol, Wisconsin, not Burlington.

When the trial court sustained the jury's finding on Count 2, it effectively accomplished an unconstitutional constructive amendment of the indictment. The grand jury's contours of Count 2, including the time and place of the crime charged, were ignored.

Defendant Kramer necessarily stands convicted of offenses not charged by the grand jury. His convictions therefore should be reversed. *Stirone* v. *United States*, 361 U.S. 212 (1960).

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,

JOHN A. KRAMER,
Defendant-Appellant

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# APPENDIX

## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 82-2024

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

JOHN A. KRAMER,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 81 CR 106—Robert W. Warren, *Judge.*

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Argued February 11, 1983—Decided July 5, 1983

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Before CUMMINGS, *Chief Judge,* and CUDAHY and POSNER, *Circuit Judges.*

CUMMINGS, *Chief Judge.* This appeal from a criminal conviction involves a number of issues, the most interesting of which is whether the warrantless search of people's garbage, put outside their homes for collection, violates any interest protected by the Fourth Amendment.

Defendant was indicted for two counts of drug trafficking (21 U.S.C. §§ 841(a)(1) and 846) and two counts of tax evasion (26 U.S.C. § 7201). The indictment charged

that defendant had conspired with unidentified persons to distribute large quantities of marijuana and amphetamines during the years 1977 and 1978, that on one occasion in 1977 defendant had distributed some 1,000 pounds of marijuana, and that defendant had wilfully attempted to avoid paying income taxes owed for the years 1977 and 1978. All four counts were tried together before a jury. Pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, the trial judge acquitted defendant of the tax counts at the close of the government's case, and the jury convicted defendant on both drug counts. The judge denied defendant's post-trial motions, sentenced him to 5 years in prison with a two-year special parole term, and he has appealed. For the reasons that follow, we affirm.

I. *Legality of Seizure of Drug Sales Records*

Among the evidence received at trial were records of marijuana sales by defendant. The records were found among garbage defendant had put by the roadside in front of his house to be collected by a private garbage removal service. The garbage was in plastic trash bags inside plastic garbage containers with plastic tops (Tr. 247-249). Without a warrant to do so, local police investigators picked up the trash bags, transported them to a police station, and searched through their contents on the station floor. Prior to trial, defendant moved to suppress these records, claiming that the garbage pick-ups—the police made three of them—were unlawful under the Fourth Amendment. The judge denied the motion without an evidentiary hearing to determine whether the trash bags were on defendant's property when the police removed them, reasoning that since defendant had not shown (1) that what was in the trash bags "was not really garbage" and (2) "that he had not abandoned the garbage in question" (App. 32-33), defendant's Fourth Amendment rights had not been violated.

We agree with the trial judge that the special protection the Fourth Amendment accords people in their "persons, houses, papers, and effects" does not extend to their discarded garbage. *United States* v. *Terry*, 702 F.2d 299 (2d Cir. 1983), certiorari denied, 51 U.S.L.W. 3826; *United States* v. *Shelby*, 573 F.2d 971, 973 (7th Cir. 1978), certiorari denied, 439 U.S. 841. Of course people sometimes do not want others to see things—*e.g.*, magazines, financial records, correspondence, doctor bills—that they sometimes throw away. But people can easily prevent this by destroying what they want to keep secret before they discard it, or by not discarding it. Defendant could have burned or shredded his drug records before he discarded them or kept them hidden somewhere inside his house. The law requires that people travelling in public take care to keep hidden things in their possession they do not want others to see, *United States* v. *Lee*, 274 U.S. 559, and not to say things they do not want others to overhear, *Hoffa* v. *United States*, 385 U.S. 293, and that people who want to keep secret numbers they dial on the telephone not make their phone calls at home, *Smith* v. *Maryland*, 442 U.S. 735. There is nothing unfair about requiring that people not discard things they want to keep secret, or destroy them before they do.

Because of an added feature of this case we do not agree with the trial judge that the inquiry ends there. Defendant alleges that the police trespassed on his land to reach the trash bags. It appears that Judge Warren made no finding where the trash bags were when the police seized them. Defendant's pre-trial motion to suppress the drug sales records was denied without an evidentiary hearing even though defendant alleged in an affidavit in support of that motion that the trash bags were removed from his property. One of the policemen who picked up

the garbage bags testified at trial that the bags were located just beyond the perimeter of defendant's property and judging from his ruling on defendant's motion for a new trial, Judge Warren may have credited that testimony as undisputed:

> Any doubts as to the correctness of that [suppression] ruling were dispelled during the offer of proof made by defendant at trial concerning the physical layout of the area from which this garbage was seized. Therefore, the Court rejects defendant's seizure argument.

(Government App. 5.) However, the Government as much as concedes in its brief that this testimony was not undisputed by admitting that in defendant's pretrial affidavit he claimed "that the garbage was taken from an area inside his [perimeter] fence" (Br. 13). Therefore, we must assume that the garbage was on defendant's property when the police removed it.

Though one might suppose from the language of the Fourth Amendment that it does not protect people against searches of their lands, the Supreme Court has interpreted it to protect all reasonable, legitimate expectations of privacy, *United States* v. *Knotts*, 103 S. Ct. 1081; *Rakas* v. *Illinois*, 439 U.S. 128, 143; *Katz* v. *United States*, 389 U.S. 347, and there is no reason, in theory at least, why homeowners cannot have reasonable, legitimate expectations of privacy in their adjacent lands. *United States* v. *Swart*, 679 F.2d 698 (7th Cir. 1982); *United States* ex rel. *Saiken* v. *Bensinger*, 546 F.2d 1292 (7th Cir. 1976), certiorari denied, 431 U.S. 930. Defendant may have had a privacy expectation in the land on which he claims the police trespassed and if he did, then, assuming the trespass invaded that privacy, any evidence recovered from the trash bags should have been suppressed—the police acted on behalf of the state when they conducted the

search, and evidence a state obtains in violation of a person's Fourth Amendment rights may not be admitted against that person in a federal criminal trial. *Elkins* v. *United States*, 364 U.S. 206, overruling the often criticized "silver platter" doctrine established in *Weeks* v. *United States*, 232 U.S. 383, 398. It does not follow, moreover, that because any expectation of privacy defendant may have had in his garbage was unreasonable, it was constitutionally permissible for the police to trespass on his land to seize his garbage. Defendant's expectation regarding his garbage and his expectation regarding his land are distinct. We do not doubt, for example, that had the police broken into defendant's house and removed the records from a waste paper basket in defendant's bedroom, the records would not be admissible as evidence against him, even if all that was in the waste-paper basket was garbage.

For present purposes, an expectation of privacy is simply an interest protected by the Fourth Amendment. The alleged trespass invaded defendant's privacy if it infringed some interest the Fourth Amendment was intended to protect. The Fourth Amendment protects at least three possible interests that would have been at stake had the police broken into defendant's house to search for his drug records.* First is defendant's interest in peace and quiet. The Fourth Amendment protects that interest by prohibiting searches that physically disrupt people's households. *United States* v. *United States District Court*, 407 U.S. 297, 313 ("[P]hysical entry of the home is the chief evil against which the wording of the 4th Amendment is directed * * *"). Police cannot, for example, ransack someone's house, see, *e.g.*, *Mapp* v. *Ohio*, 367 U.S.

* The three interests which we describe are not intended to be exhaustive, but they are generally descriptive of the interests which might be at stake on the facts before us.

643, or fly a helicopter 20 feet above the roof of his house, see, *e.g.*, *People* v. *Sneed*, 108 Cal. Rptr. 147 (Cal. Ct. App. 1973), to look for evidence of criminal conduct. Second is defendant's interest in relaxation, in retiring someplace, his home, where because what he says and does is not subject to public scrutiny, he can act as he pleases. Many people enjoy stepping offstage now and then; it gives them a chance to do and say things they might well be too reserved to do and say in public. The Fourth Amendment protects that interest; it keeps people's homes off the public stage by limiting the power of the government to eavesdrop and spy on home lives even when the spying and eavesdropping do not physically disrupt households. *Alderman* v. *United States*, 394 U.S. 165; *Katz* v. *United States*, 389 U.S. 347; *Dietemann* v. *Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968), affirmed on state grounds, 449 F.2d 245 (9th Cir. 1971). Third is defendant's interest in public esteem. Most people know facts about themselves, *i.e.*, habits they have, customs they observe, beliefs they hold, thoughts they think, that they prefer to keep to themselves, not because they would act any differently if the public knew them but because the public might think less well of them if it knew them. By limiting the power of the police to eavesdrop and spy in ways that are not physically intrusive, the Fourth Amendment also protects this interest.

The trespass defendant alleges to have occurred did not infringe any of these interests. Defendant claims, and as noted above we assume, that the police removed Kramer's trash bags from just inside a knee-high chain fence that runs along a street curb some 30 feet from the front of defendant's house. (See Government's Exhibit 102-1-2.) To do so, it was necessary for the police to trespass a few feet upon the outer edge of his front yard either by reaching across the fence into the air space above the yard or

by stepping across the fence onto the yard. Neither act was a threat to the peace and quiet of defendant's home. The trespass did not interfere with defendant's enjoyment of his front yard—the police emptied the trash bags at the station, not on defendant's lawn—nor did it interfere with the weekly routine defendant followed to dispose of his garbage—the police unobtrusively picked up the trash bags on the same days defendant's regular garbage collector would have. In fact, defendant did not even discover that the trespass had occurred until the government told him of it some 3½ years later pursuant to its open file policy. Nor was this kind of trespass and seizure a threat to the secrecy of defendant's home life. It did not enable the police to hear or see things in or near defendant's house that they would not have been able to see or hear if they had remained just beyond the fence, which was a single chain of metal suspended some 2 or 3 feet above the ground, not a solid 20-foot wall. Compare, *e.g.*, *State* v. *Boyton*, 574 P.2d 1330 (Haw. 1978). The fence may have persuaded passers-by not to wander onto defendant's front lawn, but it certainly did not keep them from observing activities about defendant's house.

Defendant does, of course, have a possessory interest in his land, an interest in preventing others from using it, and that interest was infringed by the assumed trespass. But the Fourth Amendment does not protect possessory interests in land. *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12; *Hester* v. *United States*, 265 U.S.57. Every trespass, by definition, invades someone's right of possession, but not every government trespass violates the Fourth Amendment. *Hester*, *supra*. Only those that infringe a privacy interest do; preventing others from using one's land in the circumstances here is certainly not a privacy interest. Therefore the district court's denial of the motion to suppress was proper.

II. *Reasonable Doubt Instruction*

We turn now to the remaining issues in this appeal which require less discussion. Defendant claims that he was denied a fair trial because the trial judge forbade his attorney from explaining to the jury during closing argument what the phrase "reasonable doubt" means. It was for the judge, not counsel, to explain the law to the jury. *United States* v. *Parr-Pla*, 549 F.2d 660 (9th Cir. 1977), certiorari denied, 431 U.S. 972. If a jury instruction explaining reasonable doubt should have been given, it was for the court, not counsel, to give it. *United States* v. *Scales*, 599 F.2d 78 (5th Cir. 1979); *United States* v. *Sawyer*, 443 F.2d 712 (D.C. Cir. 1971). This Court has twice held that a trial judge need not explain to the jury the meaning of the phrase "reasonable doubt," *United States* v. *Shaffner*, 524 F.2d 1021 (7th Cir. 1975), certiorari denied, 424 U.S. 920; *United States* v. *Lawson*, 507 F.2d 433 (7th Cir. 1974), certiorari denied, 424 U.S. 920; indeed, given the likelihood that any definition will favor one side over the other, we have cautioned against such instructions. *United States* v. *Regilio*, 669 F.2d 1169 (7th Cir. 1981), certiorari denied, 102 S. Ct. 2959, and the criminal instructions adopted for use in this Circuit forbid such an instruction. Federal Criminal Instructions of the Seventh Circuit 2.07, p. 18 (1980). Therefore it was appropriate for the trial judge to refuse to give such an instruction in this case and not error to forbid defendant's counsel from giving an "instruction" on reasonable doubt during closing argument. Defendant's counsel was not prevented during closing argument from attempting to create a reasonable doubt of guilt by presenting his view of all the evidence; he was simply prevented from giving an "instruction" that the trial judge had previously decided not to give in accordance with our strictures.

III. *Government's Promises of Consideration to Its Witnesses*

Defendant's next contention is that the prosecutor improperly vouched for the credibility of some of the government's witnesses by asking each of them during direct examination if he had promised to testify truthfully in exchange for some form of consideration from the government. Each answered that he had and that he understood that if he did not testify truthfully he could be tried for perjury. Defendant argues that because the prosecutor did not stand up at trial and charge any of the government's witnesses with having breached his promise to testify truthfully, the jury probably thought that the government believed that none of its witnesses had breached his promise and that each had testified truthfully. But the result would have been the same had there been no mention of the promises. Unless the prosecutor had stood up and charged a witness with perjury, the jury would just as probably have thought that the government believed that its witnesses were telling the truth. Mention of the promises did not create the appearance that the government had a greater stake in the honesty of its witnesses. Perhaps the government has a slightly greater interest in charging a witness with perjury when the witness's promise to tell the truth was the consideration for the government's promise to grant immunity—proving perjury might be a prerequisite to rescinding the agreement—but no juror would be inclined to suppose that the difference is enough to make the government any more certain about the credibility of witnesses who make such promises.

IV. *Prosecutor's Reference to Possible Perjury Charge*

Defendant suggests that it was also improper for the government to advise the jury during opening and closing arguments that its witnesses could be tried for perjury if

they lied on the stand. Witnesses who testify at criminal proceedings run the risk of being tried and convicted for perjury if they do not tell the truth. That risk is likely to make their testimony more credible, just as the risk of being tried and convicted for, say, theft is likely to make would-be thieves more respectful of others' property. And the likelier it is that the government will try a witness it suspects of lying, the more credible his testimony is likely to be. Consequently it is not improper for the prosecutor to remind the jury of the deterrent effect the threat of a perjury conviction has upon the conduct of government witnesses who to obtain a grant of immunity might otherwise be inclined to lie. It is also appropriate for the prosecutor to indicate his willingness to bring charges against those he suspects of perjury so that the jury may better measure this deterrent effect. *United States* v. *Israelski*, 597 F.2d 22 (2d Cir. 1979); *United States* v. *Ricco*, 549 F.2d 264 (2d Cir. 1977).

V. *Variance Between Indictment and Proof*

Defendant complains of four variances between the indictment and the proof at trial. A variance between allegation and proof is not fatal to a criminal conviction, assuming the proof is of an offense the grand jury intended to charge, unless it affects substantial rights of the accused, Rule 52(a) of the Federal Rules of Criminal Procedure, either by depriving him of an adequate opportunity to prepare a defense or by exposing him to a risk of being prosecuted twice for the same offense. *Berger* v. *United States*, 295 U.S. 78; *United States* v. *Moser*, 509 F.2d 1089 (7th Cir. 1975). By this measure, each of the variances claimed was harmless.

The indictment alleged a single conspiracy. Defendant first claims that the evidence at trial was of four different drug conspiracies, each involving defendant and a dif-

ferent cast of co-conspirators. Defendant argues that because the indictment did not name his alleged co-conspirators, it is not possible to tell for which conspiracy he was convicted and whether that conspiracy is the same one charged in the indictment. It is not critical to this argument whether the government's proof at trial established that defendant was a member of one large conspiracy or several smaller ones. Even were we to hold that the evidence at trial was of one conspiracy, not four, defendant could still make the same claim. Since the indictment does not name defendant's alleged co-conspirators, there would still be no way to tell whether the grand jury and the petit jury believed defendant had conspired with the same persons. And although it would be certain which conspiracy defendant was convicted of, it would still be necessary to examine the complete trial record to determine whether double jeopardy bars any subsequent criminal proceeding. Consequently, the reason for this first variance, assuming it exists, is that the grand jury did not name defendant's co-conspirators.

There is, however, no requirement that a conspiracy indictment identify uncharged co-conspirators. *Rogers* v. *United States*, 340 U.S. 367, 375; *United States* v. *Kendall*, 665 F.2d 126 (7th Cir. 1981), certiorari denied, 455 U.S. 1021; *United States* v. *Artuso*, 618 F.2d 192 (2d Cir. 1980), certiorari denied, 449 U.S. 861, 879; *United States* v. *Indorato*, 628 F.2d 711, 718 (1st Cir. 1980), certiorari denied, 449 U.S. 1016; *Leverkuhn* v. *United States*, 297 F.2d 590 (5th Cir. 1924). In fact, given the stigma named co-conspirators suffer, it may well be that the grand jury that indicted defendant lacked the power to name his alleged uncharged co-conspirators. *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975). True, there is language in the plurality opinion in *Russell*, *supra* at 770-771, to

the effect that a defendant cannot "be convicted on the basis of facts not found by * * * the grand jury which indicted him," and when the indictment does not name the accused's alleged co-conspirators, there is generally no way to be certain that the conspiracy found by the grand jury has the same members as the one found by the petit jury. But decisions following *Russell* establish that this rule is a limitation not on the power of courts to hear evidence, but on their power to amend indictments, either in form or effect. The rule applies only when the fact in question is a material element of the offense charged, as it was in *Russell*. *Hamling* v. *United States*, 418 U.S. 87, 117; *United States* v. *Fabrizio*, 385 U.S. 263, 271; *United States* v. *CINA*, 699 F.2d 853 (7th Cir. 1983). A criminal defendant can cure any uncertainty he has about the factual setting for the charged criminal conduct by requesting a bill of particulars. *United States* v. *Debrow*, 346 U.S. 374. Here, defendant need not even have done that; because of the government's "open file" policy, all relevant evidence in the government's possession was available to him. There is no requirement that persons not charged with criminal conduct suffer the stigma of being named co-conspirators in an indictment just so that defense attorneys can avoid the inconvenience of discovery. And here there is no danger that because the indictment did not name defendant's alleged co-conspirators, he might be re-prosecuted for the same offense. The entire record in this proceeding is admissible in any subsequent criminal proceeding to prove that defendant has already been prosecuted for the same offense. *Russell* v. *United States*, 369 U.S. 749, 764; *Bartell* v. *United States*, 227 U.S. 427, 433; *United States* v. *Haas*, 583 F.2d 216, 221 (5th Cir. 1978), certiorari denied, 440 U.S. 981; *United States* v. *Covington*, 411 F.2d 1087 (4th Cir. 1969).

Defendant's second claim concerns the trial judge's instruction to the jury that it could find defendant guilty of the conspiracy charged in Count I of the indictment if it

found that he had conspired to distribute or possess with intent to distribute "marijuana or amphetamines, or both." (Tr. 2289). Defendant claims that because Count I charges him with conspiring to "possess with intent to distribute and distribute marijuana, * * * *and* amphetamines" (emphasis supplied), the government was required to prove that the conspiracy involved both drugs. Although a defendant may not be charged with alternative offenses in the same count of an indictment, *Confiscation Cases,* 87 U.S. 92, 98; *United States* v. *Donovan,* 339 F.2d 404, 407-408 (7th Cir. 1964), he may be charged with alternative commissions of the same offense. Rule 7 of the Federal Rules of Criminal Procedure specifically provides that "[i]t may be alleged in a single count * * * that [the defendant] committed [the offense] by one or more specified means." The Advisory Committee Note to this provision explains that it was "intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways." A single conspiracy to commit different drug offenses is a single criminal offense, *Braverman* v. *United States,* 317 U.S. 49; since a defendant cannot be sentenced twice for the same offense, charging defendant in two counts for what were different objectives of the same conspiracy would have been improper. *United States* v. *Mazzochi,* 75 F.2d 497 (2d Cir. 1935). The only question then is whether the word "and" in the phrase "marijuana * * * and amphetamines" in Count I of the indictment may be read to mean "or," whether, that is, a defendant charged with committing a single offense by doing A and B, each a different means of committing the offense, may be convicted if the jury finds that he did either A or B. The Supreme Court long ago held that a defendant may be convicted in that circumstance, *Crain* v. *United States,* 162 U.S. 625, and that remains the rule. *United States* v. *Conti,* 361 F.2d 153 (2d Cir. 1966), vacated on other grounds, 390

U.S. 204. Even were that not the rule, defendant would not be able to show that he was prejudiced by the trial judge's reading of Count I. Defendant knew of that reading before his trial began (R. 39), and if the grand jury thought the evidence before it sufficient to charge defendant with a conspiracy involving two drugs, *a fortiori* it must have thought that evidence sufficient to find a conspiracy involving one of those drugs.

Defendant's third and fourth claims of variance go to the accuracy of certain facts alleged in the indictment. Count II charged that defendant committed the offense therein described "on or about September 20, 1977 at Burlington," a small town in Eastern Wisconsin. In fact, the evidence at trial indicated that the offense occurred a few weeks later at a neighboring town. There was also some evidence at trial that the drug involved in the conspiracy was "methamphetamines," not "amphetamines" as alleged in Count I. These variances were plainly harmless. See *Ledbetter* v. *United States*, 170 U.S. 606; *United States* v. *CINA*, 699 F.2d 853 (7th Cir. 1983); *United States* v. *Moser*, 509 F.2d 1089 (7th Cir. 1975).

VI. *The Pre-Sentence Reports And IRS Notes*

Defendant claims he was improperly denied access to two pre-sentence reports containing statements two government witnesses made to their probation officers and to notes an IRS agent prepared of an interview with a government witness. The trial judge reviewed these materials *in camera* and refused to order their release on the ground that none of the information they contained was helpful to defendant. We have examined those materials also and we agree with the trial judge that none of the information in them could possibly have affected the outcome of defendant's trial. *United States* v. *Cyphers*, 553 F.2d 1064 (7th Cir. 1977).

Defendant's remaining arguments do not merit discussion. Judgment of conviction affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1983

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-2024 vs.

JOHN A. KRAMER,

Defendant-Appellant.

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Appeal from the United States District Court for the Eastern District of Wisconsin. No. 81 CR 106
Robert W. Warren, Judge.

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ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant John A. Kramer, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.